UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE TRUSTEES OF THE NEW YORK STATE NURSES ASSOCIATION PENSION PLAN, : Docket #21-cv-08330

Plaintiff, :

-against- :

WHITE OAK GLOBAL ADVISORS, LLC, : New York, New York
April 11, 2023

Defendant.

--------------------------------:

PROCEEDINGS BEFORE
THE HONORABLE ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: COVINGTON & BURLING, LLP
BY: CHRISTOPHER Y. L. YEUNG, ESQ.
620 Eighth Avenue
New York, New York 10018

For Defendant: SIDLEY AUSTIN, LLP
BY: STEVEN E. SEXTON, ESQ.
REBECCA LEWIS, ESQ.
1 S. Dearborn Street
Chicago, Illinois 60603

Transcription Service: Marissa Mignano Transcription
Phone: (631) 813-9335
E-mail:marissamignano@gmail.com

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service

INDEX

E X A M I N A T I O N S

Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE COURT: All right. So we are here for NYSNA Pension Plan versus White Oak Global Advisors, LLC, 21-cv-8330, for a discovery application.

Counsel, please put in your appearances, starting with plaintiffs.

MR. YEUNG: Hi, Your Honor. My name is Chris Yeung from Covington & Burling. I represent the plaintiff, the Trustees of the New York State Nurses Pension Plan.

THE COURT: All right. For defense?

MR. SEXTON: Good afternoon, Judge. Steve Sexton and Rebecca Lewis on behalf of White Oak.

THE COURT: Okay. And I do see there are a number of folks on the phone, but I think we have the two parties that we need. So I will ask, to the extent anyone else is dialed in, to please put yourself on mute if you are not already in that position.

So, as you know, the matter was referred to me by Judge Kaplan, and I have reviewed some of the basic materials filed in the case, and I've, obviously, read the letters that you've submitted. We've got two issues, and I think we'll just take them one by one.

So the first one is about the value, or the

net asset value, as of a particular date. As I understand it, the award, and Judge Kaplan agreed, is a NAV, net asset value, as of August 4, 2021. And as I also understand it, on September 3, 2021, the defendant transferred various interests in what I understand to be securities of some sort that are in a particular value. I'm not sure what that value actually is, in the sense that I share the concern of the plaintiff, that if you transfer something on September 3rd that is not cash and, therefore, the equivalent of the NAV as it was on September -- you know what the NAV was on August 4th. Let's say it's $100.

So if you transfer $100 on September 3rd, you're good, but if you transfer something that the value of which has a NAV that is to be valued differently, how do you know that the NAV on September 3rd is equal to what the NAV was on September 4th?

And I guess that's a question for Mr. Sexton.

MR. SEXTON: Sure, Your Honor. So I think it's fairly simple. So the award and Judge Kaplan's decision confirming the award both recognize that what could be transferred are the -- are assets. So

it's not an all-cash payment; it's an asset transfer.

THE COURT: Yep.

MR. SEXTON: And to take a simple example, if you had an investment fund that owned ten shares of IBM stock and investor -- call it the Plan -- owned a 10 percent interest in that investment fund. If the investment fund transfers one share of IBM stock to the Plan, they got their NAV as of any particular date. It doesn't matter whether the transfer is made on September 3rd or August 4th. You know, the IBM shares may go up and down in value, but if they have a 10 percent interest in a fund and they recognize they got their pro rata interest in their investment fund, they, by definition, got their NAV. You don't need to do an NAV calculation because you're transferring assets.

It would be different if it was an all-cash payment. I would agree with you -- with them, that, if we were ordered to pay all in cash, you'd have to figure out the NAV, but this is an asset transfer, so when we transfer their pro rata --

THE COURT: Yeah. I actually was looking at it a little in the reverse, which is, if you're transferring assets, those -- the value of those

assets can change between August 4th and September 3rd, so don't I have to value those assets on September 3rd to know whether they are still the equivalent of what was supposed to be transferred on August 4th?

MR. SEXTON: No. No, because it's -- you're transferring a pro rata interest in the assets. So if they were 10 percent of the fund and they got 10 percent of their interest in the fund, they, by definition, got their NAV as of any particular date. I mean, that's how the asset transfer would work.

THE COURT: I don't -- but I don't -- didn't the arbitrator and Judge Kaplan reject the idea of pro rata share? The whole point is there's a $96 million award -- 96 plus -- and that has a particular -- that is the net asset value as of August 4, 2021, so it's -- the defendant is obligated to transfer assets that have that value, the $96 million value. They can't transfer the same assets if they happen to have gone down and have a value of, say, 80 million.

MR. SEXTON: Well, no. I think that there are two problems there. One, although the arbitration award referred to a $96 million number,

that was not as of August 4th. It was -- and Judge Kaplan recognized that. He essentially said, I see that $96 million number in the award. I don't know what it relates to. It's not an August 4th NAV calculation. I think, as the arbitrator herself says, that it's as of May 19, 2021. So why that's in there, nobody knows. But it's certainly not an August 4, 2021 NAV calculation.

And I think what Judge Kaplan recognized is, you know, one of the -- one of the issues was, you know, how does the pro rata distribution work? And what he said on page 19 of his March opinion, which is Docket 59, he said that -- he made reference to an in-kind distribution of ownership interest in the two underlying funds in which the plan had invested in. And he said, you know, that -- he took issue with that. If that was the proposed pro rata distribution in the two funds, if you just gave them, you know, their 10 percent interest in the two investment funds, that may not be good enough to satisfy the arbitration award.

But what we did -- I mean, White Oak is -- its business model is, essentially, it makes loans to third parties. And White Oak -- or the Plan had been invested in two White Oak funds that had made

loans. When we carved out their assets, we essentially made them a co-lender. So to the extent a $100 loan had been issued and NYSNA was $10 of that loan, they got their pro rata interest in that loan, and they're -- they are now a co-lender alongside of White Oak on the loans.

And so when they got their asset distribution on September 3rd, they got all of their pro rata interest in the underlying loans that they're invested in. And, of course, the loan value may go up and down, right? I mean, the principal may be repaid. And if a principal is repaid on a loan, that -- the NAV is going to go down. It -- between August and September, the Plan got money back, principal payments back, from White Oak on their investments, so, of course, the NA -- I mean, they're complaining in their letter motion that it looks like the NAV went down, but, of course, it went down. I mean, they got a -- they got a principal distribution. So, you know, to the extent they're getting repaid on their loan investments, their NAV is necessarily going to go down.

And we did give them -- just to be clear, we gave them, a long time ago, the August 4, 2021 NAV calculation, which is not an ordinary-course

calculation. You know, ordinarily, White Oak does NAV calculations quarterly. It hires Stout, which is an independent firm, to value all the loan investments. And then it hires SEI, which is an independent administrator, to calculate NAV for its investors. And so we did -- White Oak did a special NAV calculation for the plan as of August 4, 2021. We gave them the SEI paperwork relating to that calculation. We gave them the Stout paperwork. We gave them the valuation number.

But we haven't -- you know, we -- to do a September 3rd NAV calculation, that information doesn't exist. You'd have to value the investments as of September 3rd, and then -- what they're proposing is we then go out and hire SEI again out of our own pocket to do another calculation for them. And I think that type of burden --

THE COURT: How much does that cost?

MR. SEXTON: I don't know how much it would --

THE COURT: Well, how much did it cost for August 4th?

MR. SEXTON: I think it was in the tens of thousands of dollars. I don't know the exact figure, sitting here right now.

THE COURT: That's okay, but that helps me in terms of range. Okay. So let me --

MR. SEXTON: But it --

THE COURT: Go ahead. Finish. Go ahead.

MR. SEXTON: No, no. I guess I -- but our -- I think our bigger issue conceptually is, is because this is an asset transfer, you just don't need to know the NAV number. I mean, they got a pro rata distribution.

THE COURT: Yeah. So let me ask Mr. Yeung to respond to that. I see Mr. Sexton's point, I think, which is that -- let's say they had transferred on August 4th the -- whatever it is they transferred on September 3rd. It's still the same thing as of September 3rd. And if they're correct -- if -- that the NAB has gone down because principal has been returned and you've gotten the benefit of holding that -- those securities, or those interests, since August 4th, now -- and put it differently: If you had received it on August 4th, you'd be in the same position as when they transferred it on September 3rd because you would have had whatever happened to the NAV happen during that month; it's just that on September -- by September 3rd, when it was in their hands, it just

happened to be on their watch.

So why should there be any different valuation on September 3rd? I mean, think of it; if the market had gone up or somehow the loans became more valuable by September 3rd, then would you really be saying they would need to do evaluation to make it equivalent to the value that should have been transferred on August 4th? Presumably not, because then you'd be losing the numerical advantage of having gone up during that time.

So help me understand why the fact that you're getting -- or you're getting shares and -- well, shares, that it -- that itself isn't sufficient.

MR. YEUNG: Let me start, then, with the language of the judgment, right? This is the judgment that was affirmed by -- that Judge Kaplan issued confirming the arbitrator's award. It says, "disgorgement of the net asset value of the Plan's assets as of August 4th." That's the start and the end of it. It's the value that White Oak was directed to transfer over, not the assets. And to -- you know, just to --

THE COURT: Just -- hold on. Just remind me. The value -- what was the value, what they

have --

MR. YEUNG: They have disclosed, according to SEI, that August 4th SEI valuation that they procured, it was in the $86 million range. I think it's 86 million -- 86.39 or 3 --

THE COURT: Okay.

MR. YEUNG: -- 86.4 million or so. Yeah.

THE COURT: And are you contending that on August 4th you should have gotten the equivalent of $96 million?

MR. YEUNG: Of $96 million?

THE COURT: Yeah.

MR. YEUNG: No. It would be -- well, look, not the 96 million that's in the -- we don't take that 96 million in that final award as the thing that they were supposed to transfer to us for.

THE COURT: Okay. So what are you saying you should have gotten on the 4th? And what's the difference in the value?

MR. YEUNG: Yeah. Well -- so at least this $86.4 million value, right? And White Oak chose to try and -- to say, Well, we're going to satisfy that aspect of the judgment by giving you paper, by giving you something that's not cash, right, by giving you securities.

THE COURT: And Judge Kaplan explicitly recognized that, of course, that was what was going to happen.

MR. YEUNG: That's a possibility. But, you know, he also acknowledged in his memo that -- and he is parroting again -- he repeated what the arbitrator said, that if -- White Oak may be forced to find liquidity to satisfy its disgorgement obligation. So, in other words, if they choose to provide us with some sort of in-kind distribution, it still has to be worth what the net asset value of our holdings were back in August 4th.

Right now, we're in the -- sort of in a position where they've transferred these securities and these things to us. That's what they claim. We're not -- there's another dispute over to what extent that transfer is effective. But they say, You -- we've given you this -- these securities on September 3rd, but we're not going to -- we don't know how much they're worth on the date of transfer, and we don't have to tell you.

All right, that's what their position is. And the interrogatory at issue here, Rog 3, is directed at requiring them to provide that valuation because if they don't have that valuation, how can

they be in a position to argue, as they are arguing now, that they're in compliance with the judgment?

The test also is availability. We've talked about SEI. You've seen the Judge Kaplan case that we cited in our paper. They were able to procure a valuation from SEI for August 4th. You know, they continue to have a relationship with SEI. This is something that is certainly within their power to obtain, and White Oak should be required to provide it. It's a valuation of what they claim to have given us on September 3rd, as of that date.

THE COURT: Well, a couple issues are raised there. So what about the point that what they gave you had a valuation on August 4th? And, yes, whatever they gave you would have a different value on September 3rd, but has been made up in a different way, such as payment of principal.

MR. YEUNG: Well, they haven't -- oh, sorry. Just to respond to that --

THE COURT: No, no. Go ahead.

MR. YEUNG: I don't have a calculation. I've seen no calculation that says that repayment of principal makes up for the delta between what the August 3rd value was and September 3rd value of the securities are because I don't even have the value

of the securities. They haven't given us that. You know, how do you make the argument that you've been made whole via some type -- via some return of capital -- sorry -- return of principal if you don't even know what that difference is?

So I don't -- that's not -- you still need to start with this, how much were the asset -- how much were the things that you say you gave us on September 3rd worth on September 3rd?

THE COURT: And did they pay you any portion in cash?

MR. YEUNG: I think they were -- my recollection is they returned some amount of uninvested cash, but it was not -- I don't have that number off the top of my head.

THE COURT: Mr. Sexton, do you just recall generally?

MR. SEXTON: Yeah. There was a return of uninvested cash. It was in the low million.

THE COURT: Okay. So there was still very substantial portion that was in the form of ownership of the loans; is that right?

MR. SEXTON: Correct.

THE COURT: Okay. And when I say "ownership of the loans," that's ownership in the

funds that hold the loans?

MR. SEXTON: No, no. They are now, essentially, co-lenders on the loans they -- we took them out of the two investment funds and gave them their pro rata interest in the investments directly.

THE COURT: And just --

MR. SEXTON: They kind of sit alongside White Oak. Sorry.

THE COURT: And just help me understand a little more just what the -- you say there are loans and they have an interest in the loans, so are these buckets of loans that, you know, are thousands and thousands of loans, or are we talking about something else, or...

MR. SEXTON: I don't think it's thousands and thousands. I think it's the order of magnitude of 100 or so. I could be off, but it's not --

THE COURT: What kind of loans?

MR. SEXTON: It's not thousands and -- I think they're loans to small- and medium-sized companies. It's operating capital. It's -- you know, they're private credit loans where you loan money to small- and medium-sized companies that may not be able to get loans from a traditional bank so they can fund and finance their operations.

THE COURT: All right. And the transfer of those assets was made as of when?

MR. SEXTON: As of September 3rd. The reason September 3rd -- the only reason it came up is, when the arbitrator issued her award on the 4th of August, she said, make the -- disgorge the August 4th NAV within 30 days. September 3rd was in 30 days, so we made the transfer on that day, but it could have been September 2nd or -- that was just the end of the 30 day-period.

THE COURT: And the assets and -- so help me understand. You hired the outside firms to do the valuation. Have you provided that to the plaintiff?

MR. SEXTON: Yes. A long time ago.

THE COURT: Okay.

MR. SEXTON: We -- yeah, yeah. Well -- long before any of these discovery issues came up.

THE COURT: Okay.

MR. SEXTON: We gave them the August 4th NAV calculation.

THE COURT: Okay.

MR. YEUNG: Well, just to be clear, we had to file a motion to compel in order to get the August 4th SE valuation.

THE COURT: Okay.

MR. YEUNG: And we ultimately got it after that motion was granted.

THE COURT: But, basically, Mr. Yeung, they're saying, We were required to pay you $100. We paid you assets: $10 in cash and $90 in another non-liquid form that, as of August 4th, was worth the full amount of the $100 together, and then we transferred those assets to you 30 days later.

And so, as Mr. Sexton is saying, they gave you what had the net present value on August 4th. Why do you need to know any more than that?

MR. YEUNG: Because they didn't give it to us on August 4th. So the stuff, the illiquid portion of it, may not have been worth $0.90 anymore on the dollar, you know, to the tenth. I mean, that split doesn't work anymore. We don't --

THE COURT: Well, other than --

MR. YEUNG: Right now, we don't know --

THE COURT: Do you say that other than in terms of payment in principal? I mean, they're loans, so there's a fixed amount that's going to be due, right?

MR. YEUNG: Well, no. So these are -- that's not the way that this works. I think that

the way that these investments, as I understand it, work, you know, you make -- the plan invested in funds. Those funds made loans to -- and pooled at -- pooled other, pooled the White Oak, pooled the Plans funds with other investors and then made loans to, you know, private companies, you know, sometimes obtained equity in various tranches; all, you know, none of them publicly traded, right? This is all private -- you know, privately held businesses, as I understand it, or mostly are.

Then what they purported to do on August 4th is back out our share, our pro rata share of that loan, that equity, and I think transferred them over to some special-purpose vehicles. You know, while we're -- we have maybe a 0.4 percent interest in a particular loan, other White Oak assets have the other 96 -- you know, 99.6 percent of the loans in equity, so there's a different dispute about whether or not they've complied with other aspects of the judgment in doing this.

But at the end of the day, we have this sliver of interest in a variety of different loan and equity investments that nobody has valued. They haven't valued as of the date of transfer. And they're saying that this stuff was all that they

needed to do to comply with the judgment. They've made the same argument before the arbitrator. They made the same argument before Judge Kaplan, a pure in-kind transfer. In both instances, the arbitrator and Judge Kaplan said that's not enough. The judgment says disgorgement of net asset value of the plan. You know, if they made the transfer on September 3rd, we need to know what the value is of the stuff that they transferred to us on September 3rd to understand whether or not they're in compliance with the judgment.

THE COURT: But if, let's say for the moment what they transferred you on September 3rd is exactly what was the subject of their valuation on August 4th, and so we're basically talking about a difference of 30 days or so to get it moved. And so you're concerned that what you got on September 3rd may be of lesser value than what you would have had on August 4th.

But if they transferred -- I mean, what would have been -- in the but-for world, what would have been different? They would have transferred these assets to you. Let's say they -- it all happens on August 4th somehow. In the next 30 days, you're the owner of that interest, and so whatever

happens between August 4th and September 3rd you're subject to anyway. You're not in any worse a position or any different position than you would have been if they had pushed that to you 30 days before, are you?

MR. YEUNG: Well, I think the -- we can -- if we actually own them on the 4th --

THE COURT: Hold on just a minute.

Someone's chatting in the background, so please put yourself on mute if you are. Thank you.

Go ahead, Mr. Yeung.

MR. YEUNG: If we, in fact, had owned the assets in your hypothetical on August 4th, we would have had 30 days worth of control over them in order to do with them as we would.

THE COURT: What kinds of things could you have done with them?

MR. YEUNG: Not -- I'll have to go talk -- I mean, I don't know what we could have done with them, but the problem is, here, they're given -- White Oak was given various options on how to satisfy the judgment. They chose to satisfy this judgment through a distribution of these illiquid assets. That's what they chose to do.

If they want to do that, you know,

that's -- they need to -- they -- we should be able to get the value that we're owed on the date of that transfer. That's what the judgment says. If they'd made the transfer on August 4th, I think we would be -- I don't know that we would be in front of you making this motion.

THE COURT: Well --

MR. YEUNG: They didn't. They didn't, right? They waited a month to do it.

THE COURT: Well, they had to do a valuation. They couldn't -- how did they have a valuation on the day of transfer? Don't they need some time to perform that valuation?

MR. YEUNG: They had -- they have all the information. You know, they held on to the asset for the 30 days. They have the underlying information. We don't -- excuse me -- we don't have the information. They could have procured --

THE COURT: That's not my question. My point is, if they're determining the net asset value as of August 4th, don't they have to do that valuation after August 4th?

MR. YEUNG: And they've done -- that's the same thing that they did with the August 4th valuation, too, right? The one that they provided

to us wasn't provided to us until several years after the purported asset transfer. So right now, they haven't given us anything, saying that what we transferred on -- what they say they transferred on September 3rd is equal to the August 4th valuation. They've given us one input, but not the other.

THE COURT: Let me go back to Mr. Sexton. So I was making a few assumptions in there. I don't know if they're correct.

Again, you're supposed to transfer as of August 4th. When was the valuation done of what you actually ended up -- or to get at the August 4th number?

MR. SEXTON: I don't recall the exact point in time, but it was some -- it wasn't -- obviously, it wasn't the day we got the arbitration award, which was August 4th. It was done sometime after that.

THE COURT: Right.

MR. SEXTON: But I continue to go back to if, you know, Judge Kaplan's decision confirming the award says on page 18 that the arbitrator properly framed the award against the backdrop of the investment management agreement, which provided that White Oak would "transfer to the trustees all books,

records, accounts, cash, securities, and other evidences of ownership" -- it goes on. And that's what we did.

So we -- you know, they call it a -- say they had a 10 percent interest in the two funds. We gave them their pro rata distribution of their assets. And that, by definition, equals the August 4th NAV. It has to. If you go back to the IBM share example, I mean, IBM stock may go up and down. You get your share of IBM stock, and it is your NAV as of any particular date. It's by -- when you get a pro rata distribution, it is your NAV as of any date. And they agree they got their pro rata distribution. They say it in their motion-to-compel briefing.

MR. YEUNG: We don't agree with that, number one, but that's -- I mean, this is a --

THE COURT: Well, Mr. Yeung, I understand -- tell me if I'm wrong. I understand your position to be that, for payment of NAV based on the arbitration order of Judge Kaplan, pro rata asset is -- does not suffice, or does it?

MR. YEUNG: The assets aren't a value. I mean, maybe that's the simplest way to put it, right? A value is a value; it's a number, right?

And they've given us a value of approximately $86 million of what -- that's what their own -- that's what their valuation company said the assets were worth at the day -- you know, on August 4th. They need to give us 84 -- 86 -- right, $86 million worth of value.

THE COURT: But look --

MR. YEUNG: Yeah.

THE COURT: They're supposed to give you a NAV value as of August 4th, right, that's worth a certain amount? They say, Here, we're giving you these ten widgets. We have valued them. As of August 4th, they were worth $86 million, and that's what we owe you, period. Then they give you those assets because, as of August 4th, that's what they were worth. Why does it matter the 30 days between -- you know, from the time it's actually transferred, let's say -- you can't transfer instantaneously.

How does -- the value is still based on August 4th. The assets themselves may have gone down in value since then, but as of August 4th, that's what they were worth and they gave them -- that's what they gave you.

MR. YEUNG: So I guess I'll make two

points. Yeah, I think there you're equating -- you're making -- you're making the -- you're -- you see no -- there's no daylight between what the assets are and what the value is, right? That's the assumption you would have to make in order for that to be true, but that's not the case here. They specifically made the argument that the value should be the assets to Judge Kaplan, to the arbitrator. And Judge Kaplan's memo, if you read further down from where Mr. Sexton was reading, it actually says the award establishes that White Oak cannot satisfy its obligation through an in-kind distribution of fractional interest and instruments that it controls and flow through the prohibited ERISA transactions --

THE COURT: Right.

MR. YEUNG: -- although in-kind distribution is not precluded categorically.

THE COURT: Right.

MR. YEUNG: Now, what is the in-kind distribution that they're talking about? Is the exact same thing they did here. Judge Kaplan's decision was issued in 2022, in March. This was, you know, six months after they had made this purported transfer. They said that this purported

transfer was sufficient and Judge Kaplan disagreed.

THE COURT: Right. But let me ask -- can I just --

MR. YEUNG: Yeah.

THE COURT: I just want to understand something because I read it the same way you do, but an in-kind transfer can be an in-kind of something other than these fractional interests. There are other types of things they may have that might be in kind.

MR. YEUNG: Yeah.

THE COURT: Of course, those would be subject to the same potential issue, that their value could go down between -- or their value would change in some way in that 30-day period. I don't know how that the analysis would be any different.

You know, we're looking at this as a discovery issue. So, Mr. Yeung, how can, on a discovery request a party be compelled to expend funds to obtain information that doesn't exist under their custody, control or possession?

MR. YEUNG: So I think we would dispute that it's not under their possession, custody or control. I mean, that's sort of the aspect here.

THE COURT: Well, they can give you all the

data, but you'd have to go out and then hire your people to figure out what the NAV is. They don't have the NAV as of September 3rd.

MR. YEUNG: Well, it's an -- it's -- so I think there -- if this were a document request -- give us your -- the NAV that you prepared for September 3rd -- I think you would be correct on that, Your Honor.

This is an interrogatory and the -- it's a little bit different. If you look at the case that we cite, the Auction Houses Antitrust case, you know, there, Judge Kaplan framed the issue as one as availability and required the company in that instance to procure information from a former CEO who was apparently resisting, and at least resisted initial overtures to provide the information. Judge Kaplan said, No. You have to go get that information from the former CEO.

THE COURT: Well, that's information that exists --

MR. YEUNG: Go ahead.

THE COURT: -- in a form somewhere. It's not, in other words, in some embodiment. Here, your -- what you really want is a calculation that hasn't been performed yet, and that's going to

require some expertise and some consulting.

MR. YEUNG: Yeah.

THE COURT: And you're basically asking the defendant to do an expert analysis, essentially, and to pay for it as a response to discovery. And, you know, I understand why, of course. They, in some sense, should have the burden of proving that what they've provided you is the NAV value on August 4th, and really what you're doing is disputing theories about how you arrive at that. They say it's already been determined. We provided you what we were obligated to.

Do I have the power, in response to this motion, to compel them to expend funds? All -- of course, in -- they always -- court can always cause expenditure of funds to respond to discovery. It costs money and time to do that. But to actually do an analysis that hasn't been performed?

MR. YEUNG: I think you do because they've done the analysis as of August 4th, when it was beneficial to them, right? That's -- they've already -- they've done that, right, from the same company?

THE COURT: They had to do it on -- I mean, they had to do that valuation. I mean --

MR. YEUNG: Well, I would -- sorry.

THE COURT: No, no.

MR. YEUNG: Yeah, I would submit that they have to do this valuation, too, because it's two parts, right?

THE COURT: Right.

MR. YEUNG: One is what was it worth on August 4th, and what is it worth when you gave it to us, right? So they gave us one, but not the other. I would say that my -- you know, our position is that both are necessary and both are obtainable. They can't just give us one without the other.

THE COURT: Well, let's say they go ahead and do this analysis --

MR. YEUNG: Yep.

THE COURT: -- and they come up with a number that is materially different in your view than the August 4th number. Then there's going to be a question: Which is the correct valuation? And that seems to me a merits determination.

MR. YEUNG: I agree with that. And then we would -- you know, depending on what that number is, we may be, you know, in front of -- it would not be a discovery dispute; it would be a compliance issue.

THE COURT: But shouldn't -- which should

come first; determination of the -- which is the correct way to do that valuation, or to do discovery and do an analysis that possibly in the end might be rejected as the appropriate way to look at it?

MR. YEUNG: So our -- the issue of what is the proper way of return this value, that's already -- in our view --

THE COURT: That's already been determined.

MR. YEUNG: -- it's already been determined. You know, Judge Kaplan heard all their arguments before issuing the judgment, and he issued this judgment.

THE COURT: Yeah. And, Mr. Sexton, you -- I mean, it is the case that Judge Kaplan, as I understand, said, Look, in kind is one thing, but providing fractional interest, that, you can't do. That's not the equivalent. How do you get around that?

MR. SEXTON: Well, I think, one, I mean, I read his opinion slightly differently. I mean, I think -- I think if -- to harmonize the arbitrator -- I think he's harmonizing the arbitrator's award, which says you can transfer assets. I think what -- when I read the portion of his opinion that talks about fractional interest,

he's saying you can't transfer fractional interest in the investment funds that they owned. And I think the concern was, you know, if you give them fractional interest in the two investment funds that they were in before, then they're really in the same spot they were in --

THE COURT: Right.

MR. SEXTON: -- before you gave them something. You really haven't put them in a different footing. I think that -- you know, that -- I guess, maybe what didn't come through in our briefing before Judge Kaplan, which wasn't really an -- the issue before him, is that we made them co-lenders, essentially, on the loans.

THE COURT: Right.

MR. SEXTON: And so they have an asset that they can do with what they want. And they have. They have a new investment manager who's been making investment decisions. They can sell these assets, so they have complete control over them. So I think that --

THE COURT: Hold on. Hold on a minute. Hold on a minute. Do they own the loans outright, or they only own a percentage interest in the loans?

MR. SEXTON: They own their percentage

interest in the loan, but they --

THE COURT: Their percentage interest.

MR. SEXTON: -- can dispose of that interest. There -- I mean, they can find third parties to sell them to. They're making decisions. They're making decisions on the loans that are different than what White Oak is making for their investors. So whenever there is a decision to be made, White Oak comes to their new investment manager, it's called Comvest, and says, Comvest, here's the decision. How does your client want to proceed? And Comvest instructs White Oak how to proceed. And so they're in full control of their loan.

THE COURT: Okay. So if they're in full control of it, doesn't that cut against you? Because let's say the 30-day period were a six-month period, and let's say the value of those interests, the -- of those interests in those loans had a value on August 4th that has diminished by half. They've missed six months of their opportunity to dispose of those interests as they had wished to -- you know, they figured out -- they've projected: This is not going to be a good investment. We don't want to hold these, and so we're going to turn around and

sell them.

Now, that six-month period, could you come back and say, Well, we gave them to you six months later, but they had this value on August 4th? I don't -- how does that fly and why is that any different?

MR. SEXTON: Well, the arbitrator said, You have to return their August 4th NAV, and you have 30 days to do it.

THE COURT: Yeah.

MR. SEXTON: And we returned it within 30 days. And they got -- I think it -- they got their August 4th NAV.

THE COURT: Yeah.

MR. SEXTON: It didn't say -- the award doesn't say, Give them a September 3rd NAV if you happen to return it on September 3rd. It says, Give them the August 4th NAV.

THE COURT: No, but like I said -- well, what if the award said give it in six months? I don't know that that -- or within six months. If you choose to wait that time, then you are depriving them of the ability to dispose of the value that it had on August 4th. You're providing a different value 30 days later or six months later or a year

later for them to do what they want with. It's just that they may be working with a much less value.

As I said, I don't think they'd be coming back if there were an increase in the value, but that doesn't mean they should be taking the risk or the brunt of your providing them something with -- arguably has less value on September 3rd than it did on August 4th because they don't have that value on September 3rd.

But I understand -- look, I understand the arguments on both sides at this point. And, really, this determination, in part, as I said, sort of has a merits aspect to it. I guess we also don't know how significant a difference the value is, the net present value is, on September 3rd.

One thing I was going -- I did want to ask about how much this costs. And also, how long does it take to do such a valuation, Mr. Sexton?

MR. SEXTON: Well, I guess there -- I mean, I -- there are, I guess, conceptually, two different kinds of valuations, right? There's valuing the underlying loan investments. And so on a quarterly basis, that's what White Oak hires Stout to do. And that's very expensive because they're -- you know, Stout is looking at the whole portfolio. And then

you --

THE COURT: Right.

MR. SEXTON: And then --

THE COURT: I'm just talking about August 4th valuation, if it were to be done for September 3rd, how long would that take?

MR. SEXTON: I would guess a couple weeks. I mean, I can't speak for SEI and how long it would take them to do that, but I would guess at least a couple weeks.

THE COURT: I mean, in a sense, I could order you-all to provide to the plaintiff all the data that would be necessary to determine a September 3rd NAV and then they go out and do it, but I don't know that you would want to provide them all that data.

I mean, look, I do think the September 3rd NAV has to be determined because I do think that's the right consideration, as has been argued by the plaintiff. In terms of the cost, you know, equity might say the parties should split it. On the other hand, given the fact that the value is supposed to be what it was on August 4th, we don't know if it is, and so there's no way to verify whether it has been complied with. And in that sense, then it

would be on the defendant.

But if the defendant is saying, We have supplied you with what we think the value is, and plaintiff -- and, plaintiff, you disagree, then I do think it is incumbent on both sides to be footing the bill for this, so I'm going to -- my order is that, yes, a September 3rd valuation has to be done, but the parties have to share that cost equally.

MR. YEUNG: Thank you, Your Honor.

THE COURT: All right. The second issue is about individual investor names. And this issue, I would like a little more education on. I think I understand it and I think I know what a good solution might be, but I would just like to understand.

Mr. Yeung, explain it a little more, what the restriction is that you're -- or threshold that you're trying to guard against or you're concerned about at this 25 percent threshold. What's that about? And then why do you need to know investor names rather than just their accounts anonymously?

MR. YEUNG: So under ERISA, if White Oak's -- if you have a fund that has monies that are invested in -- into it by various investors that are subject to ERISA and benefit plans, in other words,

and, you know, there are -- that money pooled together directly or indirectly -- held directly or -- through indirect or direct channels, if that percentage equity is over 20 -- or it's 25 percent or over, then the person managing the funds is subject to ERISA duties. That's sort of at the most basic level.

There are certain exceptions to it. And, you know, one thing that White Oak has pointed to is that the entities that are what they call the "financing affiliates," which hold these -- which have these funds, they call them "operating companies." We disagree with that characterization. That's part of the discovery that we are taking and we're looking at. But, you know, that's -- if it's not an operating company, if it's, in fact, an investment vehicle -- and we contend these financing affiliates are investment vehicles based on White Oak's own public disclosures, among other things -- then they would owe us fiduciary obligations under ERISA, which would be in direct violation of the aspect of the judgment that says they have to remove themselves as a fiduciary and investment manager.

Separately, there is a fact-intensive test under ERISA where, even if you are not -- you know,

you don't have this -- you don't hit this 25 percent threshold, if you are deemed in control, as a practical matter, through the various machinations of corporate ownership and other types of control, you are -- still can become -- you could -- still can be considered the ERISA fiduciary of somebody whose money that is under your control.

And so there -- there's at least those two aspects where we think the investor identities are relevant. And specifically, you know, the actual investor names are relevant for the 25 percent threshold test because we don't have information -- even on the anonymized basis, we don't have information that would be required to verify whether or not these entities that White Oak has anonymized are, in fact, ERISA plans or not.

What they've told us is, Here's a list. It's anonymized. We have a column that says whether or not they're ERISA entities or not. We're not going to tell you the names of the investors. And the -- whether or not they're ERISA plans or not, that's also information from the entities. There -- it's not information from White Oak. It's information that the entities apparently gave to White Oak. So, you know, they can't -- you know, we

don't have information -- we don't -- we can't verify that, and they're not necessarily even standing behind it. And, you know, the law -- the legal test --

THE COURT: So -- hold on. So let me go down that a little bit.

MR. YEUNG: Yeah, sure.

THE COURT: So for those who may hold over 25 percent, you want to understand whether it is an ERISA plan that holds those funds in interest or whether it is something else. Do I have that right?

MR. YEUNG: That's part of it. And it's not necessarily that one entity has to hold 25 percent, but as long as there's a 25 percent or more of ERISA money in there directly or indirectly. And, you know, if it's through a parent entity or through some other fund that goes down, then there's a math problem that has to be done, right, in order --

THE COURT: And for your purposes, in terms of whatever it is you allege, if what -- what is it that you're really looking for? Are you looking to find out if they have over 25 percent ERISA-type funds being held by somebody who's not a plan. I mean, just explain to me. I'm using the terminology

wrong, probably.

MR. YEUNG: Yeah, sure. If -- collectively, if what they -- if -- ultimately, you know, the equity -- among the stuff that White Oak purportedly gave us on September 3rd is our equity interests in a variety of different companies. What we want to understand -- you know, we're a plan. We have plan funds. If the other equity holders are also plan funds and that is -- over the totality of the equity holders, there's the -- there's over 25 percent of ERISA money in it, that would trigger, in our view, fiduciary obligations that White Oak owes to us on the basis of this ERISA rule. That would be in violation of the -- that would be in violation of the judgment. The judgment says White Oak has to remove itself as fiduciary and investment manager.

THE COURT: So when you say that you need to verify and White Oak doesn't necessarily have that information, what is it you are seeking to do? Are you seeking to go to all these investors and seek discovery from them?

MR. YEUNG: I -- sometimes if you can -- if they reveal investor name and it's obviously a -- you know, a pension plan or some entity that's a --

that is subject to ERISA, I don't think we would need to do that, necessarily. And in -- but, you know, there may be instances, and that's really the -- this -- the issue here. They said they'll give us these investor names if we agree never to -- don't contact the investors at all, right? That's what they've told us they'd do -- that they were willing to do.

We can't promise that because there may be instances where we have to go out, and for this purpose, to enforce the judgment, for legitimate judgment-enforcement purposes, to obtain discovery necessary for this action, to contact those investors. And, you know, we understand all of our obligations with respect to the protective order and all the -- those things, but we can't agree not to go, right now, without even knowing what their names are, that we can't do it. And that's really the dispute on the discovery front.

THE COURT: And, in turn, can -- based on the information that White Oak has provided you, the anonymous information, can you tell which entities, percentage-wise, create an issue for you that you would want their names?

MR. YEUNG: We can't because we don't have

43

the names.

THE COURT: No, no, no. But what I'm saying is, if there's an issue about -- in the data they provided you, do they provide you with the extent of the holdings that those entities have, regardless of their name?

MR. YEUNG: They give us commitment numbers, which they've told us aligns with a percentage amount. Yeah.

THE COURT: Okay. And so if you see a number that says, let's say, 3 percent, and then something else says 28 percent, you're only interested in the 28 percent number, or am I looking at this way too simplistically?

MR. YEUNG: I think you -- it's not just one entity. You have -- it's a collective, right? So let's say if there are ten entities, ten investors that hold, collectively, 28 -- 25 or more --

THE COURT: Got it.

MR. YEUNG: -- then that could trigger the -- that could trigger the percentage, so yeah.

THE COURT: And do you -- so you need to -- you're wanting to assess, then, any entity name that suggests or indicates it is an ERISA plan?

MR. YEUNG: That, and -- yeah, that's -- that would be one of the things we would look at, correct. Yes.

THE COURT: Well, what else?

MR. YEUNG: Well, it's -- you know, I think if there are -- I mean, that may be all. That may be the end of it, right? That may be the end of the analysis because it'd be very apparent, based on the names of the entities, that they're ERISA funds and, therefore, you're above the 25 percent threshold.

THE COURT: And how many customers are we talking about that they gave you?

MR. YEUNG: Looks like -- I'm just looking at the sheet they gave us. 416.

MR. SEXTON: I think it's 416.

MR. YEUNG: Yeah, 416.

THE COURT: 416, Mr. Sexton?

MR. SEXTON: Yes.

THE COURT: Okay. And what -- I don't know what those, obviously, are composed of, whether they're all ERISA-type plans, whether none are, whether some may be.

Do you have a way -- well, I mean, who -- are you in a position where you could and you would agree to provide them the names of any that are --

appear to be plans, ERISA plans?

MR. SEXTON: Judge, could I just back up and explain --

THE COURT: Yeah, absolutely --

MR. SEXTON: -- what we actually did?

THE COURT: Sure.

MR. SEXTON: And we have a graphic if it would be helpful. We had circulated it. We could put it up on the screen.

THE COURT: I have it.

MR. SEXTON: I don't know if it's necessary.

THE COURT: I have it.

MR. SEXTON: So we won't put it on the screen. But the graphic is meant to show -- so you have, you know, two White Oak funds, then you have NYSNA, and they're transferring money to what's called a "financing affiliate," which, in turn, you know, makes loans to other people.

Their argument is say, you know, 25 percent or more of the eight investors in White Oak Fund 1 are ERISA investors, then that -- and that money is going to the financing affiliate. Then the financing affiliate could have -- whoever is managing the financing affiliate could have ERISA

fiduciary duties to the plan. So if 25 percent or more of total investor money is ERISA money, then you could have, you know, ERISA obligations.

THE COURT: Right.

MR. SEXTON: And what we said to them -- we said, you know, Look, we disagree, but we're going to give you the information you need to do your 25 percent test. And so what we did is we took all of the investors. White Oak has a database. And so each time an investor invests, they sign a subscription agreement. And the investor indicates in the subscription agreement whether or not they are subject to ERISA. And so if the investor, when they sign their subscription agreement, says, Yes, White Oak, we're subject to ERISA, White Oak puts it in their database in the normal course of business. So every time they have a new investor, they are continually updating their database to identify who's subject to ERISA, who's not.

We generated a list on an anonymized basis of all the investors. We put their investment amount, and we indicated whether or not they are subject to ERISA based on what the investor represented in the subscription agreement, and that's from a database maintained in the ordinary

course of business. And we sent it to them. And they can look at that and they can see Investor 1, 2 and 3, and whether they're subject to ERISA and their investment amounts and determine for themselves whether this 25 ERISA -- percent ERISA test is met or not. They have all of the information to do that. They have everything they need.

They don't need to know the names because we've given them the ERISA status based on what the investor told White Oak. So they -- and the idea of contacting some 400 White Oak investors in a judgment-enforcement proceeding is really hard to swallow because these are confidential investor names. We've given them the ERISA status. And we previously said, We will give you the names, but you got to promise not to contact our investors because that could be very disruptive to White Oak's business to have a plaintiff contacting 400-some White Oak investors. And they refused, and that's why we gave them the information on an anonymized basis.

THE COURT: And the 416 names, only some of those represented themselves to be ERISA, or those are all --

MR. SEXTON: Correct.

THE COURT: -- ones?

MR. SEXTON: No, no. That's all of the investors. And the ones that said, We are subject to ERISA, we indicated that in the Excel spreadsheet we gave to them.

THE COURT: And --

MR. SEXTON: We indicated their investment amounts.

THE COURT: And about what number or percentage of the 416 are ones that fall under the ERISA umbrella based on their representations?

MR. SEXTON: It's a fairly small number. We have the spreadsheet up, but I'm not sure we could quickly tell you the precise number, but it's a relatively small number.

THE COURT: What -- would it be -- you know, what about the prospect of Mr. Yeung's client, or at least Mr. Yeung, you know, in the legal capacity -- would it -- is there so much harm to White Oak in -- with the prospect that they might be contacting that handful of your investors or customers, but not the others?

MR. SEXTON: No. I think that would -- I mean, that would spook investors to get a call from

a lawyer of a former investor that has sued them and been involved in contentious proceedings, and then they're calling them to say, Are you subject to ERISA or not?

One, I don't -- I don't know that the investor -- if I were the investors' counsel, I'd say, Don't even talk to them. I --

THE COURT: Yeah.

MR. SEXTON: -- because I don't know why they're asking you this. But I think that'd be very disruptive to the investor relationship and it's unnecessary. They have the information. I don't -- I mean, we've told them, based on what the investor told us, whether they're subject to ERISA.

THE COURT: Okay. So, Mr. Yeung, I am sort of puzzled what you really -- that's why I was asking about why do you really need to -- the name? And you say to verify. To verify what?

MR. YEUNG: Verify ERISA -- to verify the -- whether or not they're subject to ERISA or not if we need to, right? If it --

THE COURT: Well, if they -- if on this, on their -- the number -- the spreadsheet that has been provided, the 416, and there are ones that are indicated to have represented that they are covered

by ERISA, what would prompt you to call or get in touch with one of them or more of them? Are you going to be asking, Well, we want to confirm that?

MR. YEUNG: If it's a -- well, I'd be more -- it would be, really, the ones that indicate that they are not, right?

THE COURT: Ah, okay.

MR. YEUNG: You know, the noes.

THE COURT: So you think it may be underrepresented on the list of 416.

MR. YEUNG: I don't know one way or the other because I don't have the names. I have a list, right, that they provided. I have no way of doing one thing or the other right now.

THE COURT: Okay.

MR. YEUNG: And the -- may I also mention one other thing? I don't know if there are any White Oak, you know, principals, members, individuals, employees, directors, anybody affiliated with White Oak that are on this investor list and, you know, maybe -- may create situations where they owe us fiduciary obligations as a more general matter of corporate law, putting ERISA aside, which, again, would also, I think, be in violation of the judgment, but I'll leave that to

the side for now.

MR. SEXTON: Could I address that point?

THE COURT: Sure.

MR. SEXTON: So I don't understand that point because, to the extent that there are White Oak principals that invested in these investment funds, like the ones we put on our graphic, these are passive investment funds. They're not managed by any individual investor in the fund. But White Oak is an investment manager. White Oak, the entity, manages the funds. There's no -- this is not a situation where you have, like, a joint venture where a majority share -- controlling majority shareholder in a joint venture with a minority shareholder had fiduciary duty.

These are passive investment funds. And so we've identified all of the persons who are subject to ERISA based on our records. And they don't need to know whether any of the principals of White Oak are investors in these investment funds because that -- it doesn't give rise to a fiduciary relationship in the fund itself.

THE COURT: Okay. This is what we're going to do: We're going to take this in steps. So I'm going to order that the names be produced, but that

the plaintiff not be permitted to contact any of those entities without first seeking and obtaining Court approval to do so.

MR. YEUNG: Okay.

THE COURT: And that way, you'll be able to have a more focused discussion, if we need to, about particular potential investors and customers and what the real reasons are for wanting to contact those entities.

MR. SEXTON: Could we also request that that be attorneys' eyes only, so just Covington's counsel?

THE COURT: Mr. Yeung, do you have a position on that?

MR. YEUNG: What is the -- I guess my question -- I mean, we can talk -- I can talk to Mr. Sexton about this offline. I would be interested in understanding what their concern is because these are -- my clients are trustees in a pension plan; they're not -- this is not -- this is -- they're not -- you know, they're not investment managers. They're in the same industry. There are no concerns of that sort here, so I'm just --

MR. SEXTON: But --

MR. YEUNG: Yeah.

MR. SEXTON: But your client does have -- your client did retain an independent investment manager to manage this investment, which is a competitor to White Oak.

MR. YEUNG: If you want to -- if you want the -- if that's the entity that you want to carve out of seeing this, I think -- subject to my client's views. I might be more -- that's a different conversation, yeah. But I'd be more open to that, but I don't know how I can have a -- it's hard for me to have a conversation with the trustees where it's just -- they're managing a pension fund, right? They're not in -- yeah.

THE COURT: Right. So, Mr. Sexton, what about that? If they were able to -- they weren't -- they were able to share with their client, but not with that particular entity, is that sufficient, or no?

MR. SEXTON: Their client representative only and lawyers, and neither can contact the investors without Court approval.

THE COURT: Without me -- without Court approval?

MR. SEXTON: Yes, I think that'd be fine.

THE COURT: Okay. And so it's -- I just want to understand. It's the client reps.

And I just want to make -- Mr. Yeung, what was that particular entity? It was an investment manager.

MR. YEUNG: Comvest.

THE COURT: Yeah, but -- and what do they do? They are --

MR. YEUNG: It's C-O-M-V-E-S-T. I think they're in -- they perform investment-management services for --

THE COURT: Got it. Okay. Great. Okay.

MR. YEUNG: They're a third party.

THE COURT: All right.

MR. YEUNG: Yeah.

THE COURT: So I think that resolves our issues. I'm going to issue a short order that embodies them so you have a written order.

Is there anything else we need to discuss, Mr. Yeung?

MR. YEUNG: No. I think that's it. Thank you, Your Honor.

THE COURT: Mr. Sexton?

MR. SEXTON: No, nothing more for me. Thank you.

THE COURT: All right. Well, thank you, all. I wish you well. And we're adjourned.

MR. YEUNG: Thank you.

MR. SEXTON: Thank you.

C E R T I F I C A T E

I, Marissa Mignano, certify that the foregoing transcript of proceedings in the case of THE TRUSTEES OF THE NEW YORK STATE NURSES ASSOCIATION PENSION PLAN v. WHITE OAK GLOBAL ADVISORS, LLC, Docket #1:21-cv-08330-LAK-RWL, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Mignano

Marissa Mignano

Date: May 9, 2023